United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4141

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United States Court of Appeals

FOR THE SECOND CIRCUIT

ITT CONTINENTAL BAKING COMPANY, INC.,
Petitioner,

v.

THE FEDERAL TRADE COMMISSION,
Respondent.

TED BATES & COMPANY, INC.,
Petitioner,

v.

THE FEDERAL TRADE COMMISSION,
Respondent.

On Petitions for Review of Orders of the Federal Trade Commission

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BRIEF FOR PETITIONER TED BATES & COMPANY, INC.

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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BRIEF FOR PETITIONER TED BATES & COMPANY, INC.

This brief is submitted on behalf of petitioner Ted Bates & Company, Inc. ("Bates") in support of its petitions for review of a Final Order of the Federal Trade Commission ("Commission") dated October 19, 1973, as modified by the Commission's Order Ruling on Petitions for Reconsideration dated December 14, 1973.[1]

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[1] Bates filed its petitions for review in this Court on November 9, 1973 (No. 73-2669) and December 14, 1973 (No. 73-2819). Peti-

PRELIMINARY STATEMENT

The unsigned opinion of the Commission (App. 199 *et seq.*)[2] supporting its Final Order dated October 19, 1973 (App. 182 *et seq.*) is reported unofficially at 3 CCH Trade Reg. Rep. ¶ 20,464 (FTC 1973), and the Commission's unsigned Order Ruling on Petitions for Reconsideration dated December 14, 1973 (App. 272 *et seq.*), is reported unofficially at 3 CCH Trade Reg. Rep. ¶ 20,495 (FTC 1973).

STATEMENT OF ISSUES PRESENTED

1. Whether the Commission violated applicable law when it based a finding of violation upon a construction of a secondary complaint allegation that is contrary to the plain meaning of the allegation, had never before been articulated during the agency proceedings, and as to which ITT Continental and Bates were afforded no notice or reasonable opportunity to defend.

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tions to review the same Commission order were also filed in this Court by petitioner ITT Continental Baking Company, Inc. ("ITT Continental") (Nos. 73-2649 and 73-2817). By orders dated December 11, 1973 and January 8, 1974, the Court transferred the four cases to the United States Court of Appeals for the District of Columbia Circuit where they were consolidated with the three other cases brought by petitioners Consumer Federation of America, *et al.* ("Consumers") for review of the same orders and an earlier order denying Consumers the right to intervene in proceedings before the Commission. On January 21, 1974 ITT Continental and Bates moved to dismiss Consumers' petitions for review of the orders under review here, and on January 25, 1974 they moved to transfer their own petitions back to this Court. The Commission on March 5, 1974 moved to dismiss Consumers' third petition. The District of Columbia Circuit deferred decision on these motions until after full briefing and oral argument on the merits but on June 30, 1975 held that Consumers had no standing, and entered an order dismissing each of Consumers' petitions and transferring ITT Continental's and Bates's petitions back to this Court (*Consumer Federation of America* v. *FTC*, 515 F.2d 367).

[2] References to "App. ——" are to pages in the Appendix.

2. Whether the record contains evidence that the advertising in issue conveyed the meaning now assigned to it by the Commission under its new construction of the complaint or was otherwise unlawful.

3. Whether the Commission could reach any decision on the meaning of the advertising to children without reference to the record evidence or the relevant findings of the Administrative Law Judge.

Each of the foregoing issues is fully briefed and argued by petitioner ITT Continental in its brief in support of its petitions for review of the same orders of the Commission to which Bates's present petitions are addressed. To avoid unnecessary duplication, Bates hereby adopts the Statement of the Case and Argument set forth in ITT Continental's brief and urges as to Bates that the Commission's Final Order, as modified, be vacated and the complaint dismissed for all the reasons set out in that brief.

In addition to the above-stated issues which have been briefed and argued by ITT Continental, Bates's petitions for review present the following issues which relate specifically to it and require the submission of this separate brief:

4. Is there an absence of any reasonable relationship between (i) the Commission's tortuously constructed conclusion that Bates violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52 (1970), by an "implied misrepresentation" that Wonder Bread is an extraordinary food to induce dramatic growth in children and (ii) the exceedingly broad cease and desist order that it entered—an order applicable to the advertising of *any food product* and affecting, in Bates's case, more than a third of its total business beyond that done with ITT Continental?

5. Is the order entered by the Commission so vague, ambiguous and meaningless as to fail to establish a rea-

sonable standard of conduct to which Bates would have to adhere to avoid future violations of that order?

6. Did the Commission err by refusing to include in its order a proviso that Bates, before it can be found to have violated the order, must be found to have known or to have had reason to know of that violation?

STATEMENT OF THE CASE

The labored course that the Commission pursued to arrive at the cease and desist order entered in this proceeding represents a shocking abuse of the administrative process.

After years in which it took no action against advertising of ITT Continental's Wonder Bread—even though it had reviewed that advertising in depth on several prior occasions (App. 84, 133-35)—the Commission in August 1971 issued a diffuse and puzzling complaint (App. 14 *et seq.*) attacking the Wonder Bread advertising upon a miscellany of unprecedented legal theories and insupportable speculation about the possible psychological or emotional impact of that advertising upon different categories of people, principally young children and their parents.[3]

The peculiar charges of the complaint were tried out in a lengthy hearing before an experienced Administrative Law Judge who, after hearing the testimony of 36 witnesses (chiefly experts or purported experts) and receiving into evidence some 180 exhibits (including stipulations of counsel), concluded that complaint counsel had

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[3] That complaint also attacked certain advertising of ITT Continental's Hostess Snack Cakes, alleging that "good nutrition" claims made by that advertising were false and that the advertising was unfair because it exploited "guilt feelings" of mothers. The Commission dismissed all claims relating to Hostess Snack Cakes (App. 220-22, Opinion, pp. 22-24).

simply failed to prove what the complaint alleged. He directed that it be dismissed (App. 140).

The Commission did not disagree with the Administrative Law Judge's conclusion that complaint counsel failed to prove the highly specific allegations of the complaint that were actually litigated at the hearing. Instead, the Commission constructed a new and different allegation, not asserted in the complaint as filed and never litigated at any hearing. It decided that this new allegation had been proved even though not litigated, concluded that ITT Continental and Bates had violated Sections 5 and 12 of the Act, and entered a broad cease and desist order.

[*Annex A to this brief sets out the text of the cease and desist portion of the Commission's Final Order dated October 19, 1973* (App. 183-84), *as modified by its Order Ruling on Petitions for Reconsideration dated December 14, 1973* (App. 276-77).]

The Commission's own decision makes it unmistakably clear that the violation found was *not* a violation charged in the complaint. First, the Commission succinctly summarized the issues presented by complaint counsel's appeal from the Administrative Law Judge's decision:

> "Complaint counsel pose three main issues for decision with respect to the complaint allegations as to the representations made by respondents' advertising. The first is what the parties have referred to as the uniqueness issue which involves essentially paragraph 8(a). The second involves the question of whether the representations alleged in the remaining subparagraphs (b)-(e) of paragraph 8 and in paragraphs 10 and 11 were made and were false. The third is whether the false representations alleged in paragraphs 10 and 11 were also unfair." (App. 212, Opinion, p. 14)

Then the Commission proceeded to reject each of complaint counsel's contentions with respect to the so-called

"uniqueness issue" alleged in paragraph 8(a),[4] with respect to each of the alleged representations in paragraphs 8(b)-(e)[5] and in paragraph 11,[6] and with respect to the so-called "unfairness issue" raised by paragraphs 10 and 11.[7]

In order to find liability, the Commission instead fixed upon paragraph 10 of the complaint which alleges:

> "Certain of the aforesaid [Wonder Bread] advertisements are addressed primarily to children or to

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[4] "We do agree with respondents that the wording of complaint paragraph 8(a) is ambiguous. Moreover, we believe that complaint counsel's statements framing this issue during the course of the trial were also vague and did nothing to resolve this ambiguity. We conclude that the ambiguity must be resolved in favor of a literal reading of the complaint. We will, therefore, rule that the complaint alleged a superiority to Wonder Bread as against all other brands rather than simply against some.

"Turning to the question of whether this representation of superiority was made in respondents' advertisements, we conclude that the record does not support the allegation." (App. 212-13, Opinion, pp. 14-15; footnote omitted)

[5] "We agree with the law judge that none of the specific representations alleged by paragraph 8(b)-(e) to be made by respondents' advertisements are expressly contained in any of these advertisements. * * * We do not believe that it is possible under this pleading for us to imply from respondents' advertisements these very specific representations as to the precise claims which these subparagraphs allege and we decline to do so. Accordingly, we will not disturb the law judge's dismissal of these subparagraphs." (App. 214, Opinion, p. 16).

[6] "In respect to the deception charged in paragraph 11 of the complaint, we dismiss for failure of proof. We are unable to conclude from record evidence that the challenged advertisements amount to a direct or implied claim that Wonder Bread is a 'necessary food' for the healthy growth of children during their preadolescent years as alleged in the Complaint." (App. 218, Opinion, p. 20).

[7] "* * * we dismiss the unfairness allegations of paragraphs 10 and 11 and conclude only that respondents' advertisements did falsely portray Wonder Bread as an extraordinary food for children's growth." (App. 220, Opinion, p. 22).

general audiences which include substantial numbers of children, which advertisements tend to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying, directly and by implication, said Wonder Bread as an extraordinary food for producing dramatic growth in children.

"Therefore, the aforesaid acts and practices were and are false, misleading and unfair." (App. 23)

No fair reading of paragraph 10 can ignore that it is concerned solely with how children perceived the advertisements under attack. The charge it makes is that Wonder Bread's advertising *exploited* children's aspirations for rapid and healthy growth. The alleged false portrayal of Wonder Bread as an "extraordinary food for producing dramatic growth in children"—a portrayal that even the Commission concedes was not direct or express—cannot be divorced from the exploitation charges.

But the Commission did not decide that Wonder Bread advertising exploited the aspirations of children. Instead, the Commission coppered together a single phrase torn from context and some largely semantic "implications"—forged from naked conclusions either unsupported or flatly contradicted by the record—to construct a post-hearing allegation. This allegation seems to be that the Wonder Bread advertisements at issue "had the capacity to deceive children and parents because they portrayed Wonder Bread as an extraordinary food for producing dramatic growth" (App. 216, Opinion, p. 18). That allegation—first revealed to Bates and ITT Continental when the Commission declared it proven—was declared to be "based on the totality of the representations which [the Commissioners] believe are conveyed by respondents' advertisements" (*ibid.*).

The word "extraordinary"—the only link between the "exploitation" charge in paragraph 10 and the supposed

misrepresentation upon which the Commission's decision depends—thus takes on critical importance.

As used in paragraph 10, "extraordinary" is nothing but a vivid adjective. The word appears in none of the Wonder Bread commercials and there is nothing in the record to suggest that there is any scientific or medical or other accepted concept of "extraordinary food."

The Commission's own language confirms that "extraordinary" as used either in paragraph 10 of the complaint or in the Commission's opinion was intended not as a comparative word in any usual sense but as a vivid adjective. Thus, the Commission derived its allegation of an implied misrepresentation that Wonder Bread is an "extraordinary" food from such findings as that Wonder Bread's advertising "implies that Wonder Bread is *extremely important* for this growth" (App. 215, Opinion, p. 17; emphasis added) and that the "selling message in the challenged advertisements was clearly designed to convince parents as well as children that Wonder Bread had *very important properties* for children's healthy growth and development" (*ibid.*; emphasis added).

> "The constant stress on children's growth years, the use of such words as 'vital elements,' 'the formative years' when children attain 90% of their growth, the dramatic visual depiction of virtually instantaneous growth, the appeal to parents to help their child grow bigger and stronger, that children will never 'need' Wonder more than right now certainly all convey a message of extraordinary value." (*Ibid.*)

It was not until Bates and ITT Continental in their petitions for reconsideration objected to that portion of the Commission's cease and desist order that deals with advertising the "comparative nutritional efficacy or value" of any food product (subparagraph 1.b., App. 183) that "extraordinary" made a chameleon change from vivid adjective to a "comparative claim" supposedly justifying

entry of the Commission's draconian order reaching all food products (see App. 275, Order on Reconsideration, p. 4).

Despite its rejection of complaint counsel's case in support of the allegations that actually appeared in the complaint, the Commission neither dismissed the complaint nor remanded to the Administrative Law Judge for a hearing to determine whether respondents had violated the law as charged in the Commission's post-hearing allegation that they had misrepresented Wonder Bread as an extraordinary food. Instead, the Commission entered a broad cease and desist order, applicable to the advertising of *any food product* and enjoining practices wholly unrelated to the specific violation found. Moreover, the obscurity of certain provisions of that order make it impossible to determine what Bates must do to comply with it, should a finding of violation be upheld.

The shocking change from the legal theories upon which this case was tried to the theory upon which the Commission was ultimately to rest its conclusion of liability, and the breadth and obscurity of the cease and desist order entered, led Bates and ITT Continental to petition the Commission to reconsider (App. 249 *et seq.*; App. 239 *et seq.*). In its Order Ruling on Petitions for Reconsideration dated December 14, 1973 (App. 272 *et seq.*), except for striking a phrase from subparagraph 1.a. of its cease and desist order (App. 274), the Commission reaffirmed all it had done, utilizing that second order largely to rationalize the excesses of its first.

SUMMARY OF ARGUMENT

As ITT Continental argues in its brief which Bates had adopted, the manner in which the Commission has proceeded in this case and its determination of liability are wholly insupportable and violate constitutional due

process and the requirements of the Administrative Procedure Act. Beyond that, even were this Court to uphold the specific violation of Sections 5 and 12 of the Federal Trade Commission Act which the Commission has found in this proceeding, the cease and desist order that was entered, even as modified, cannot be justified. It is to the infirmities of that cease and desist order that this brief is principally addressed.

I.

A. There is no reasonable relationship between the "implied misrepresentation" that Wonder Bread is an extraordinary food to induce growth in children and the cease and desist order that the Commission has entered. That order applies to the advertising of *any food product* and affects, in Bates's case, between a third and a half of its total advertising business (App. 139). The courts and the Commission itself have long recognized the unfairness of applying such far-reaching restraints where the violation found was narrowly related to a single product or kind of product. *American Home Products Corp.* v. *FTC*, 402 F.2d 232, 237 (6th Cir. 1968). That unfairness is especially so here where Bates was exonerated of the vast majority of the charges made in the complaint, including all charges dealing with Hostess Snack Cakes. Moreover, the Commission's evident difficulty in constructing a post-hearing allegation to justify the violation it ultimately found argues forcefully against so broad an order. [*See* pp. 12-19, *infra.*]

B. Each subparagraph of paragraph 1 of the cease and desist order enjoins Bates from conduct that bears no relation to anything the Commission found Bates had done. The advertising claims which those subparagraphs would prohibit are claims which the challenged advertising did not make and which were not found to be false or deceptive in this or any other Commission proceeding.

Paragraph 3 of the order, in blunderbuss fashion, bars the misrepresentation "in any manner" of the "nutritional content, efficacy or functional value to the user" of any food product. It has no basis in any finding of the Commission and lacks entirely the specificity and precision that the courts demand in any Commission order. [*See* pp. 19-30, *infra.*]

C. The entry of this broad order against Bates is based upon an extraneous consideration that has no place in the administrative process. The Commission's stated justification that "Bates is already subject to a series of cease and desist orders entered both after litigation and on consent based on challenges to advertising in which it participated" (App. 227-28, Opinion, pp. 29-30) is without basis in law, *NLRB* v. *Operating Engineers Local 926*, 267 F.2d 418, 420-21 (5th Cir. 1959), and beyond that, is an unconscionable violation by the Commission of its own solemn undertakings in consent agreements agreed to and approved by it in prior proceedings. [*See* pp. 30-34, *infra.*]

II.

That order entered by the Commission contains language that is so vague, ambiguous and indeed meaningless that it fails to state any reasonable standard of conduct to which Bates must adhere to avoid future violations of it. [*See* pp. 34-41, *infra.*]

III.

The liability of an advertising agency under Sections 5 and 12 of the Federal Trade Commission Act for misrepresentations in advertising it has prepared or placed, or has participated in preparing or placing, must be limited to such misrepresentations as it knows or has reason to know are made in that advertising. This standard has been accepted both by the Commission and the

courts, and an express proviso to this effect should be written into the present order. [*See* pp. 41-44, *infra.*]

ARGUMENT

I.

The cease and desist order entered by the Commission in this proceeding is not reasonably related to the violation found.

A. *The Commission erred by extending its order to "any food product."*

The sole basis for the Commission's broad cease and desist order is a single specific misrepresentation by implication—that Wonder Bread's television advertisements falsely

> "* * * represent to viewers that Wonder Bread is an extraordinary food for producing dramatic growth in children." (App. 192, Supplementary Finding of Fact 17; *see also* App. 215-16, Opinion, pp. 17-18)

Both the absence of record support and the manner in which the Commission has proceeded in this case preclude this Court from affirming the determination that such a misrepresentation was made. But even were the Commission's determination legally permissible, it would still fail to provide a sufficient ground upon which to affirm the Commission's sweeping and punitive cease and desist order directed against the advertising of *any food product.*

Nothing could be plainer than that a cease and desist order entered by the Commission must have a "reasonable relation" to the unlawful practice which has been found to exist. *FTC* v. *National Lead Co.*, 352 U.S. 419, 428-29 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-13 (1946); *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144, 148-49 (2d Cir. 1964); *Korber Hats, Inc.* v. *FTC*,

311 F.2d 358, 362-64 (1st Cir. 1962); *Dannon Milk Products, Inc.*, 61 F.T.C. 840, 859 (1962).

In cases involving false advertising charges, the courts have consistently reversed the Commission and vacated or modified orders which do not reasonably relate to the specific advertising under review. In most advertising cases the result has been to narrow the order's reach to the specific product involved or to that product and any substantially similar product. For example, in *American Home Products Corp.* v. *FTC*, 402 F.2d 232 (6th Cir. 1968), involving false advertising claims for Preparation H, a non-prescription drug sold for use in treating hemorrhoids, the Commission's cease and desist order had prohibited the manufacturers from disseminating any advertisement misrepresenting the efficacy of "any drug." On review, the court struck that portion of the order:

> "The proceedings in this case dealt exclusively with representations as to the efficacy of Preparation H; no other drug was involved. It was not established that petitioner is a habitual violator of the Federal Trade Commission Act, even though it is not a first offender. The effect of this provision of the Commission's order is to admonish petitioner not to violate the law again. Such an order would, in practical effect, transfer the task of enforcing the Federal Trade Commission Act, as regards this petitioner, to the district courts under 15 U.S.C. § 56. This is not within the contemplation of the Act." (402 F.2d at 237)

By the same reasoning the Commission's order in this case is unmistakably overbroad in extending product coverage to "any food product." The parallels between the *Preparation H* case and this case are exact:

> 1. The violation found depended entirely upon advertising for Wonder Bread. No other baked

goods, supermarket products or food products were involved.

2. Even though it is not a first offender, it was not established that Bates is an "habitual violator" of the Federal Trade Commission Act. The only litigated case in which an order has been entered as to Bates is *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965), the so-called *Rapid Shave* case, and there is no similarity between the theory of violation in *Rapid Shave* and that here. The *Rapid Shave* case represents the only time in more than 30 years of advertising that Bates has been found guilty of false and misleading advertising.[8] Moreover, the Court expressly noted in *Rapid Shave* that the legality of the advertising practice challenged there presented difficult and "hitherto unexplored" questions (380 U.S. at 380).

3. The effect of the Commission's order, particularly subparagraph 1.d. and paragraph 3, is to shift the duty of enforcing the Federal Trade Commission Act as to Bates from the Commission to the courts.

The approach taken by the court in the *Preparation H* case is characteristic of the approach taken by the Commission in cases where the advertising agency has been joined as a respondent. Thus, for example, in *Merck & Co.*, 69 F.T.C. 526, 562-63 (1966), *aff'd sub nom. Doherty, Clifford, Steers & Shenfield, Inc.* v. *FTC*, 392 F.2d 921 (6th Cir. 1968), where certain advertisements

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[8] The Commission attempted to justify the broad order it entered by reference to certain other orders entered against Bates on consent. Each of these, however, recites that "[t]his agreement is for settlement purposes only and *does not constitute an admission by proposed respondents that the law has been violated*" (emphasis supplied). The impropriety of using orders entered on consent to justify too broad relief in a later case is discussed at pp. 30-34, *infra*.

for Sucrets and Children's Sucrets throat lozenges were found to be false and deceptive, the Commission did not enter a cease and desist order extending to all drugs; instead it entered an order prohibiting the manufacturer and the advertising agency from misrepresenting the therapeutic efficacy of " 'Sucrets' or 'Children's Sucrets,' or any other preparation of similar chemical composition or properties * * *."

Similarly, in *J. B. Williams Co.*, 68 F.T.C. 481, 554 (1965), *aff'd*, 381 F.2d 884 (6th Cir. 1967), where the Commission found that Geritol had been falsely advertised, the Commission entered a cease and desist order prohibiting the manufacturer and its advertising agency from making false therapeutic claims "in connection with the offering for sale, sale or distribution of the preparation designated Geritol Liquid or the preparation designated Geritol Tablets, or any other preparation of substantially similar composition or possessing substantially similar properties * * *." *See also Sterling Drug Inc.*, 73 F.T.C. 979, 989 (1968) (order directing drug manufacturer and its advertising agency to cease making misleading therapeutic claims "in connection with the offering for sale, sale or distribution of the preparation designated Ironized Yeast * * *, or any other preparation of substantially similar composition or possessing substantially similar properties"); *S.S.S. Co.*, 73 F.T.C. 1058, 1096 (1968) (order barring drug manufacturer and its advertising agency from advertising that " 'S.S.S. Tonic' or the preparation designated 'S.S.S. Tablets,' or any other preparation of substantially similar composition or possessing substantially similar properties" would be of benefit in the prevention and relief of tiredness, etc.); *Farrar, Straus & Co.*, 65 F.T.C. 253, 268 (1964) (order to cease false advertising in connection with "a book entitled 'Mirror, Mirror on the Wall' or any other book of the same or approximately the same content,

material and principles"); *Carter Products, Inc.*, 47 F.T.C. 1348, 1349 (1951) (order requiring advertiser and its advertising agency to cease and desist from falsely advertising "a cosmetic preparation designated 'Arrid,' or any other product of substantially similar composition or possessing substantially similar properties").

There is still another reason why the Commission could not enter an order in this case covering *all* nutritional claims for *all* food products. Here, nutritional claims were challenged not only for Wonder Bread but for Hostess Snack Cakes as well. The Commission dismissed the Hostess Snack Cake allegations after finding no violation (App. 220-22, Opinion, pp. 22-24). There is simply no warrant for a broad products order where, as here, advertising for one of the two products involved was completely exonerated.

In *National Dairy Products Corp.* v. *FTC*, 412 F.2d 605 (7th Cir. 1969), after finding a violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), with respect only to fruit spreads, the Commission had entered an order covering all food products manufactured by respondent's Kraft Foods Division. The complaint had charged violations with respect to the sale of fruit spreads, yogurt and marshmallow topping, but the Commission had dismissed the charges involving yogurt and marshmallow topping after finding no violation. On review, the court held that an order covering all food products was impermissible:

> "The order should have been formed to fit the case. The perpetual order so including all of the many existing and new future food products is too broad under the circumstances of this case. The order should have been limited to fruit spreads. * * * The order as broadly stated would include marshmallow topping and the Commission has dismissed a Section

> 2(a) charge after finding there was no violation. *The dismissal of the charge specially weakens the basis for the broad order.* * * * We believe the remedy directed at all products of the violator under the circumstances of this case has no reasonable relationship to the scope of the fruit spread charges and findings thereon and is unsupportable. The broad order unfairly affects petitioner's ability to compete for the market with its products other than fruit spreads." (412 F.2d at 623-24; emphasis supplied)

The single violation found affords no basis for the broad order entered. The Commission's remedial discretion

> "* * * does not permit an injunction of all violations of the statute just because a single violation has been found." *Grand Union Co.* v. *FTC*, 300 F.2d 92, 100 (2d Cir. 1962).

See also NLRB v. *Express Publishing Co.*, 312 U.S. 426, 437 (1941).

The Commission has been more careful in formulating other recent orders. For example, in *Fedders Corp.*, 3 CCH Trade Reg. Rep. ¶ 20,825 (FTC 1975), respondent was found to have misrepresented the cooling capacity in extreme conditions of its air conditioners in its advertising. The Administrative Law Judge had recommended entry of an order that would have barred Fedders from misrepresenting "the performance characteristics of any air conditioner, including, but not limited to air cooling, heating, cleaning, circulation, dehumidification, or humidification, efficiency and quietness or operation." The Commission rejected that sweeping approach. Because the only performance characteristic untruthfully represented was air-cooling capacity under conditions of extreme heat or humidity, it narrowed the order to prohibit misrepresentations of "the air-cooling, dehumidification or circulation characteristics, capacities or capabilities of any air conditioner."

The courts have held that broad orders will not be upheld (i) where the respondent's violation had not previously been recognized to be a violation, *Joseph A. Kaplan & Sons, Inc.* v. *FTC*, 347 F.2d 785, 789 n. 8 (D.C. Cir. 1965); (ii) where the respondent's violation did not amount to a "flagrant" flouting of the law, *Swanee Paper Corp.* v. *FTC*, 291 F.2d 833, 838 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962); or (iii) where the order would unfairly affect respondent's ability to compete, *National Dairy Products Corp.* v. *FTC*, 412 F.2d 605, 624 (7th Cir. 1969).

The Commission's order here is vulnerable on each of the above grounds:

(i) Not only was the Wonder Bread advertising challenged here not challenged by the Commission prior to 1971, but it was specifically investigated, reviewed, and cleared by the Commission during that earlier period (App. 84, 133-35).

(ii) The violation found here was not "flagrant."[9] It was based upon a finding of an implied claim which is directly contradicted by the Commission's own findings with respect to paragraphs 8(a) through 8(e) of the complaint. It is questionable that the order entered would have been justified if *all* the violations alleged in the complaint had been proved. But *none* of the violations alleged was proved, and the violation found was one not alleged in the complaint.

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[9] The evidence is uncontradicted that Bates took considerable care to assure that the advertising it prepared and placed for Wonder Bread would not convey any false or misleading impression. Bates was one of the first advertising agencies to establish mandatory procedures for the clearance of advertising copy by its legal department (App. 136), and its legal department reviewed and cleared the advertising challenged here (*ibid.*). That Bates's legal department did not find the challenged advertising objectionable is hardly surprising in view of the fact that the same advertising was reviewed and cleared by the Commission staff (App. 262).

(iii) The Commission's order drastically affects Bates's competitive position vis-a-vis other advertising agencies by limiting even the truthful nutritional claims which Bates is permitted to make. Bates alone is required to make clarifications and qualifications that are required of no other advertising agency. The likely result is that food advertisers will take their advertising business elsewhere—to agencies not subject to such rigid restraints on what they may or may not say about a particular food product.

As this court stated in *Swanee Paper Corp.* v. *FTC*, 291 F.2d 833, 837 (2d Cir. 1961), *cert. denied*, 368 U.S. 987 (1962), when it refused to grant enforcement of an overbroad cease and desist order, "there must be some relation between the facts found and the breadth of the order." The Commission's order covering *all* nutritional claims for *all* food products for which Bates prepares or places advertising does not meet that standard.

B. *There is no relation whatever between anything found by the Commission and the provisions of paragraphs 1 and 3 of its order.*

Apart from the too-broad product reach of the order, the absence of any connection whatever between the violation that the Commission has found and the injunctions set out in subparagraphs 1.a., 1.b., 1.c. and 1.d. and paragraph 3 of the cease and desist order (App. 183-84) provides a further, if related, reason for striking both paragraphs.

The "uniqueness" prohibitions

Paragraph 1 in its entirety is a *non-sequitur*: it does not depend in any way on what the Commission found or did not find with respect to the allegations of the complaint in this proceeding. Indeed, much of the pro-

hibitory language of paragraph 1 is identical to that of the *dismissed* paragraphs of the complaint.

Rejecting the allegations in paragraph 8(a) of the complaint (App. 21), the Commission found that the challenged advertising did not represent either that Wonder Bread was distinct from other enriched bread or that Wonder Bread was nutritionally superior or "unique" (App. 213-14, Opinion, pp. 15-16). In particular, the Commission found that "no express claims of nutritional superiority are made" (App. 213, Opinion, p. 15), and no implied claims were found to have been made either. The evidence, the Commission said, "is too ambiguous to enable us to conclude that the specific representation of nutritional superiority alleged in paragraph 8(a) is contained in these advertisements" (App. 214, Opinion, p. 16).

But the order entered by the Commission effectively ignores the Commission's dismissal of paragraph 8(a). It reads instead as if the "uniqueness" allegation of that paragraph had been sustained. Subparagraph 1.a. would prohibit ITT Continental and Bates from making nutritional claims "in generalized terms" (App. 183). Subparagraph 1.b. would prohibit the making of comparative nutritional claims "without stating the brand, product or product category to which the comparison is being made" (*ibid.*). Subparagraph 1.c. would prohibit the making of nutritional claims "if there are other food product categories which are also sources of the same or similar nutritional values" (*ibid.*). Moreover, each of these prohibitions would apply even where the claims are perfectly truthful, and the Commission has no authority to prohibit truthful advertising. *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1, 24 (7th Cir. 1971); *Cotherman* v. *FTC*, 417 F.2d 587, 596 (5th Cir. 1969).

The combined effect of these provisions might be read to prohibit the advertising of non-unique nutritional at-

tributes without making an express disclosure of their non-uniqueness. Provisions like these, in a non-nutritional context, would prohibit any advertising that a particular automobile has a 6-cylinder engine or an automatic transmission because other automobiles obviously have the same attributes. These prohibitions are surely unjustified in view of the Commission's dismissal of paragraph 8(a) of the complaint.

Subparagraph 1.a.

Subparagraph 1.a., as modified, prohibits Bates from advertising, directly or by implication:

> "The nutritional properties of any [food] product in generalized terms such as 'rich in nutrients,' vitamins or iron fortified, 'enriched,' or other similar nutritional references, unless the advertised nutritional value can be substantiated for the average and ordinary use of the product by consumers or by particular groups of consumers provided they are specified." (App. 183, Order, p. 2, as modified, App. 276-77, Order on Reconsideration, pp. 5-6)

But Wonder Bread was not advertised as being "rich in nutrients," "vitamin fortified" or the like, and the Commission did not so find. The Commission dismissed paragraphs 8(b) and 8(c), which alleged that the challenged advertising represented that Wonder Bread would supply "all the nutrients" "in recommended quantities" that are "essential to healthy growth and development" (App. 214, Opinion, p. 16).

Two weeks before it issued its Opinion in this case, the Commission dismissed the complaint in *Coca-Cola Co.*, 3 CCH Trade Reg. Rep. ¶ 20,470 (FTC 1973), in which "Hi-C" fruit drink had been advertised as being "high in Vitamin C." There, the Commission followed a very different course, found that nutritional advertising in such generalized terms was laudable, and concluded:

> "There is nothing in the record to persuade us that several products with differing Vitamin C content could not quite properly be identified as 'high' in that nutrient; orange juice has not preempted the right to make a representation of high Vitamin C content." (*Id.* at 20,396)

If, as it appears, that "high in Vitamin C" claim could not be made under the order in this case, there is something very odd—and very arbitrary—about a cease and desist order which would prohibit ITT Continental and Bates from making truthful claims which other advertisers and agencies are permitted by the Commission to make. The arbitrariness is heightened by the fact that the *Hi-C* case and this case were decided within weeks of each other.

> "* * * law does not permit an agency to grant one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." *Mary Carter Paint Co.* v. *FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (concurring opinion), *rev'd on other grounds*, 382 U.S. 46 (1965).

See also Columbia Broadcasting System, Inc. v. *FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971) (setting aside FCC order where Commission's treatment of same issue in similar cases resulted in "facially conflicting decisions"); *FTC* v. *Crowther*, 430 F.2d 510, 514 (D.C. Cir. 1970) (agency acted arbitrarily where "similar supplicants receive[d] dissimilar dispensations" in recent closely comparable cases).

Subparagraph 1.a. is not reasonably related to "extraordinary growth" violation found by the Commission, would prohibit truthful advertising, and would bar the making of claims allowed by the Commission in *Hi-C*. It must therefore be stricken.

Subparagraph 1.b.

Subparagraph 1.b. prohibits Bates from disseminating any advertisement which represents, directly or by implication:

> "The comparative nutritional efficacy or value of the product without stating the brand, product or product category to which the comparison is being made." (App. 183, Order, p. 2)

Yet the Commission dismissed virtually every paragraph of the complaint in which any comparative claim was alleged. It dismissed paragraph 8(a) which alleged nutritional *superiority*; it dismissed paragraph 8(d) which alleged that Wonder Bread makes an *optimum* contribution to children's growth; and it dismissed paragraph 8(e) which alleged that Wonder Bread assures *maximum* growth and development. Given the Commission's dismissal of these paragraphs—which contain words that surely connote comparisons—there is no warrant for a blanket prohibition against the use of comparisons. This is particularly so where, as here, comparative words were not used in the challenged advertising and the implied message divined by the Commission—that Wonder Bread promised "extraordinary growth"—was not itself a comparative claim As the Commission itself said in the *Hi-C* case:

> "In interpreting suggested meanings that might be conveyed by Hi-C advertisements, we cannot ignore the fact that the challenged express claims recurring in the advertising are phrased invariably in the positive degree, i.e., 'high' and 'sensible', rather than in the comparative or superlative degree." *Coca-Cola Co.*, 3 CCH Trade Reg. Rep. ¶ 20,470 at 20,397 (FTC 1973).

Subparagraph 1.c.

Subparagraph 1.c. orders Bates to cease and desist from disseminating any advertising which represents, directly or by implication:

> "The essentiality of the product as a source of a particular nutritional value if there are other food product categories which are also sources of the same or similar nutritional values, and unless the claim can be substantiated for the normal use of the product by consumers or by a particular group of consumers provided that they are specified." (App. 183, Order, p. 2)

Yet the Commission made no finding that the advertising for Wonder Bread here represented that it or any other food product was an essential source of a particular nutritional value.[10]

The Commission conceded that it "did not find this exact type of representation to have been made in the past" by ITT Continental and Bates, but justified its injunction on the ground that a representation of essentiality

> "* * * is the type of representation that, if made, would be closely related to previous claims that implied that Wonder Bread was an extraordinary food for producing growth in children, *e.g.*, respondents' assertions that Wonder Bread supplies 'proteins, minerals, carbohydrates, and vitamins. . . . all vital elements for growing minds and bodies.'" (App. 275, Order on Reconsideration, p. 4)

This purported justification is nonsense. The leap from "extraordinary" to "essential" is simply too great—especially when "extraordinary" requires the strained sort of implication that the Commission utilized here.

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[10] Indeed, it is difficult to find any allegation in the original complaint that Wonder Bread was ever advertised as an essential source of any nutrient. Conceivably, such an allegation might be extracted from paragraph 11 of the complaint which alleges a false portrayal that Wonder Bread is "a necessary food for * * * children to grow and develop to the fullest extent during the preadolescent years." But the charge of deception in paragraph 11 was expressly dismissed by the Commission "for failure of proof" (App. 218, Opinion, p. 20).

Subparagraph 1.c. is particularly indefensible in light of the Commission's dismissal of paragraphs 8(b) and 8(c) which involved express claims of *essentiality*. As the Commission itself wrote:

> "[Paragraphs 8(b) and (c)] allege that respondents' advertisements represented that Wonder Bread would supply 'all the nutrients' 'in recommended quantities' that are '*essential* to healthy growth and development.' * * * We do not believe that it is possible under this pleading for us to imply from respondents' advertisements these very specific representations as to the precise claims which these paragraphs allege and we decline to do so. Accordingly, we will not disturb the law judge's dismissal of these subparagraphs." (App. 214, Opinion, p. 16; emphasis added)

There is simply no rational relationship between the record in this case, the violation found and the provisions of subparagraph 1.c. of the order.

Subparagraph 1.d.

Subparagraph 1.d. bars advertising which represents, directly or by implication:

> "The functional value or other attributes of any [food] product to a user through the use of demonstrations or other visual techniques unless the demonstrations are actual depictions of the actual value of the product by actual persons and represent the average and ordinary experience of consumers with the use of the products." (App. 184, Order, p. 3)

Thus, subparagraph 1.d. would prohibit Bates from advertising the "functional value or other attributes" of any food product by use of "visual techniques" which are not "actual depictions" by "actual persons" (*ibid.*). There is no warrant in the record of this case for a blanket order outlawing all use of fantasy in advertis-

ing, even when the message conveyed by that advertising is itself truthful. Surely it has not previously been thought that truthful advertising claims can be communicated only by "actual depictions" by "actual persons." *See FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 676 (2d Cir. 1963), where this Court warned that the Commission may not attribute to the consumer "not only a careless and imperceptive mind but also a propensity for unbounded flights of fancy."

Paragraph 3

Paragraph 3 contains the broadest, most far-reaching injunctions of the order. It makes no attempt to deal specifically with the narrow violation found but instead bars Bates from:

> "Disseminating, or causing the dissemination of, any advertisement * * * which misrepresents, in any manner, the nutritional content, efficacy or functional value to the user for the normal use of any [food] product by consumers." (App. 184, Order, p. 3)

The Commission has stated the adjective "nutritional" is intended to modify each noun in the phrase "content, efficacy or functional value" in paragraph 3 (App. 275n. 1, Order on Reconsideration, p. 4n. 1), but even with this limitation, the paragraph would put Bates at risk for statutory penalties for any misrepresentation of any nutritional quality of any food product.

Paragraph 3 thus involves the same kind of too-broad prohibition rejected in *Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144, 148-49 (2d Cir. 1964). This Court there struck as overbroad a provision of a Commission order requiring respondents to cease and desist from "misrepresenting in any manner the quality of cashmere or other fabric in their merchandise" while paragraph 3 would proscribe any advertising that misrepresents "in any manner" nu-

tritional claims for any food. The Court characterized the order in *Country Tweeds* as follows:

> "It is difficult to imagine an order couched in more sweeping language than the one now before us. Petitioners, found guilty of misrepresenting the quality of their cashmere through the misuse of test results, have been ordered to refrain from misrepresenting 'in any manner' the quality of their fabrics. This Court, subsequent to Hoving v. F.T.C., [290 F.2d 803 (2d Cir. 1961),] in a series of recent cases dealing with illegal payments to buyers under Section 2(d) of the Clayton Act, as amended, 15 U.S.C. § 13(d), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, has not hesitated to modify broad Commission orders which went beyond the particular illegal practices found to exist. American News Co. v. F.T.C., 300 F.2d 104 (2 Cir.), cert. denied, 371 U.S. 824, 83 S.Ct. 44, 9 L.Ed.2d 64 (1962); Grand Union Co. v. F.T.C., 300 F.2d 92 (2 Cir. 1962); Swanee Paper Corp. v. F.T.C., 291 F.2d 833 (2 Cir. 1961), cert. denied, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962). See also Vanity Fair Paper Mills, Inc. v. F.T.C., 311 F.2d 480, 487 (2 Cir. 1963), where the court, though refusing to accept some modifications proposed by petitioner, nevertheless did narrow the order to make it 'somewhat better related to * * * [petitioner's] "offending while still sufficiently prohibiting 'variations on the basic theme.'"
>
> "The principles which prompted this court in the above cases to narrow Commission orders apply with equal force here, though the violation to which the instant order is directed is deceptive advertising."

In *Spiegel, Inc.* v. *FTC*, 411 F.2d 481, 484 (7th Cir. 1969), the court reached a very similar result, striking a provision of a Commission order that barred respondent from "[m]isrepresenting in any manner the savings available to purchasers of respondent's merchandise."

Moreover, in this case, unlike *Country Tweeds* and *Spiegel*, paragraph 3 was entered after most of the charges against Bates and ITT Continental had been dismissed for failure of proof.

As the court said in *Joseph A. Kaplan & Sons, Inc.* v. *FTC*, 347 F.2d 785, 791 (D.C. Cir. 1965), in refusing to enforce a similarly defective order:

> "But when an order is as broad as Paragraph 3 of the Commission's order in this case, honest disagreements as to its scope and meaning will be considerably more frequent than otherwise might, or need, be the case. A respondent forced to operate thereunder must either expose his major business decisions to a Commission veto, or remain in the dark regarding their legal consequences, with the risk, in either event, of incurring the substantial penalties now provided for by statute."

It is significant that there is no finding by the Commission that ITT Continental and Bates have depicted falsely the nutritional content of any food; the only determination on which the order entered is based is an implied misrepresentation that Wonder Bread would produce dramatic growth in children. Moreover, the provisions of paragraphs 1 and 3 reaching all "nutrition" claims have been entered even though the Commission itself has recognized the importance of nutritional advertising and the danger of taking any action that would inhibit advertising of this type. The Commission stated in this very case, in dismissing the Hostess Snack Cake charges:

> "The instant case involves a nutritional claim with respect to a food product. And an absolute claim for good nutrition may well be objectionable for the reason that the advertisement omits things

> that should be said. On the other hand, it would be unrealistic to impose upon the advertiser the heavy burden of nutritional education, especially with respect to radio and TV commercials which in many cases are shorter than 30 seconds and seldom as long as 60 seconds. Therefore, we should not attempt to establish an overly restrictive standard of general application in this regard. To do so would be tantamount to a *de facto* ban on all nutritional advertising through the radio and TV media. In the final analysis, the question whether an advertisement requires affirmative disclosure would depend on the nature and extent of the nutritional claim made in the advertisement." (App. 221, Opinion, p. 23)

The Commission reached the same result in *Coca-Cola Co.*, 3 CCH Trade Reg. Rep. ¶ 20,470 (FTC 1973), where it ruled that claims that a fruit drink is "high in Vitamin C" were permissible and did not amount to an improper or misleading comparison even if other products are available which contain different (and higher) amounts of that nutrient. A staff statement, released by the Commission on November 7, 1974 with its *Notice of Proposed Trade Regulation Rule on Food Advertising* (39 Fed. Reg. 39842 (Nov. 11, 1974)), also recognized the value of nutrition data in food advertising:

> "Massive food advertising which avoids the subject of brand-specific nutrition information—and instead attempts to sell food products solely for such factors as taste, appearance, and association with social pleasures—has the capacity or tendency to obscure the importance of nutrition and to reduce the importance or relevance of nutrient labels to consumers." (*Id.* at 39859)

The Commission's order in this case—unrelated as it is to any finding of misconduct—threatens to diminish sharply, if not eliminate, advertising that makes nutritional information available to consumers. Surely there

is no reason why ITT Continental and Bates should be barred generally from nutritional advertising that others may employ even if they are found to have misrepresented that Wonder Bread produces extraordinary growth.

C. *Prior consent orders agreed to by Bates provide no legal justification for the too-broad order the Commission entered.*

Reaching outside the record of this proceeding, the Commission in its opinion seeks to justify the "all food products" coverage of its order on the ground that

> "Bates is already subject to a series of cease and desist orders entered both after litigation and on consent based on challenges to advertising in which it participated as illegal under Section 5 of the FTC Act." (App. 227-28, Opinion, pp. 29-30)

The Commission then listed six outstanding orders in a footnote (App. 228, Opinion, p. 30 n. 33) which failed to note that five of the six were consent orders which expressly provided that they did "not constitute an admission by proposed respondents that the law has been violated." The other—that in *Rapid Shave*, the only litigated order entered against Bates—was characterized by the Supreme Court as presenting difficult and "hitherto unexplored" questions (380 U.S. at 380).

The Commission's reliance upon prior orders entered upon consent is unwarranted. The courts have made it plain that the existence of prior consent orders is not a proper factor to be considered when an administrative agency is formulating relief in a later case.[11]

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[11] The Commission's citation of consent orders is an unjustifiable disavowal by it of the very agreements which it approved in entering the orders on consent. Each such agreement provided that it was "for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated." Since the Commission agreed to accept each of Bates's prior con-

In *United States* v. *Armour & Co.*, 402 U.S. 673, 681-82 (1971), where the government sought to read into an antitrust consent decree language not contained in it, the Supreme Court stated:

> "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issue involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. * * * Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation."

Nor is the public policy that favors settlements to be undercut by permitting a settlement to be used in later, unrelated proceedings. The classic statement is by Judge Augustus Hand in *Hawthorne* v. *Eckerson Co.*, 77 F.2d 844, 847 (2d Cir. 1935): "Settlements have always

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sent decrees pursuant to what is now Rule 2.33 of the Commission's Rules of Practice (16 C.F.R. § 2.33 (1975)), which specifically provides for the entry of consent decrees containing non-admission clauses, the Commission may not now repudiate its agreement. The Commission cannot ignore its own rules. *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-40 (1959); *Service* v. *Dulles*, 354 U.S. 363, 386-88 (1957); *Accardi* v. *Shaughnessy*, 347 U.S. 260, 265-67 (1954); *Geiger* v. *Brown*, 419 F.2d 714, 718-19 (D.C. Cir. 1969). The requirement that an agency adhere to its own rules is based not on reliance, but on the need "to prevent the arbitrariness which is inherently characteristic of any agency's violation of its own procedures." *United States* v. *Heffner*, 420 F.2d 809, 812 (4th Cir. 1969). *See also* K. Davis, ADMINISTRATIVE LAW TREATISE § 4.17, at 220-21 (Supp. 1970).

been looked on with favor, and courts have deemed it against public policy to subject a person who has compromised a claim to the hazard of having a settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction." *See generally* 4 J. Wigmore, EVIDENCE § 1061(d)(9) at 47 (Chadbourn rev. 1972).

In *NLRB* v. *Operating Engineers Local 926*, 267 F.2d 418, 420-21 (5th Cir. 1959) (the "*Operating Engineers* case"), the court considered the precise question whether an administrative agency should give any effect to a prior order entered on consent in determining what relief might be appropriate in a later proceeding involving the same respondents. There the National Labor Relations Board had issued a particularly broad cease and desist order prohibiting the respondent union from engaging in secondary boycotts against either the primary employer or "any other employer or person," and sought to justify the order on the ground that the union had a history of prior violations. On review the Court modified the order:

> "The Board attempts to justify the breadth of its order on the ground that 'the Respondent has engaged in similar violations in respect to other employers in the area * * * [and] it can be reasonably expected that the Respondent will continue to commit similar violations in the future'. The alleged 'similar violations' were two Campbell Coal cases.
>
> "At the trial of the case, the government introduced no evidence relating to any other instances of alleged violations by the Union showing a statewide or area-wide policy of engaging in secondary boycotts. No mention was made of the Campbell Coal cases. These two cases arose out of one alleged violation. In one case the charge was filed by Campbell Coal Company and in the other by the trade association of which the company was a member. As

a matter of fact no evidence was taken in these cases upon which the Board could base a determination as to whether the Union had violated the Act. The Campbell Coal cases were terminated without prejudice by a 'Settlement Stipulation' containing a provision that the Union 'does not admit it has committed the acts or has engaged in the unfair labor practices alleged in the consolidated complaint'.

* * * *

"In this case the order is designed to protect not only the employers doing business with Columbus Construction Company but 'any other employer or person.' There is nothing in the record to justify any such broad coverage. To find support for its order, the Board must go beyond the record, to the Campbell Coal cases, and, in effect, repudiate the stipulation solemnly entered into by the Board.

"We are aware of the considerations supporting a broad grant of discretion to the Board in determining the proper remedy for a violation of the Act. We consider more important, and basic to a fair administration of the Act, the hard-won principle of Anglo-American law that a judgment or order must find adequate support in the record. An order of a court or federal agency that goes beyond the record to penalize an offender as a bad actor smacks too much of attainder to be acceptable to this Court. * * *

"Accordingly, we modify the order of the Board by deleting the phrase of the first paragraph: '*or with any other employer or person*'." (Footnotes omitted; emphasis in original)

See also NLRB v. *Teamsters Local 282*, 428 F.2d 994, 1000 (2d Cir. 1970); 1B J. Moore, FEDERAL PRACTICE ¶ 0.444[3] (2d ed. 1974); Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1320-21 (1959).

The present case and *Operating Engineers* are strikingly similar. In each the agency failed to establish the breadth of the order at the level of the administrative law judge. The evidence in *Operating Engineers* established a violation with respect to one employer, yet the order prohibited activities with respect to all employers. Here, the Commission has found a violation with respect to a single food product, yet the order enjoins advertising practices with respect to all food products. In *Operating Engineers*, as here, the agency sought to justify the breadth of the orders on the basis of an earlier consent decree where it was not shown that the violations alleged in the past had been proved. And in *Operating Engineers*, as here, the prior consent decree contained non-admission clauses.

After *Operating Engineers*, the NLRB itself expressly declined to rely on consent decrees containing non-admission clauses for the purpose of establishing a history of violations. *Raymond Buick, Inc.*, 173 N.L.R.B. 1292 (1968), *supplemental decision on unrelated grounds*, 182 N.L.R.B. 504 (1970), *enforcement granted*, 445 F.2d 644 (2d Cir. 1971); *Teamsters Local 327*, 160 N.L.R.B. 1919, 1920 (1966); *see also Mason & Hanger-Silas Mason Co.*, 167 N.L.R.B. 894 n. 1 (1967), *enforcement granted in part and denied in part on unrelated grounds*, 405 F.2d 1 (5th Cir. 1968); *Bridge Workers Local 92*, 138 N.L.R.B. 428, 429 n. 2 (1962).

The Commission's reliance on consent orders entered without any prior findings of fact was plainly wrong, and the resulting too-broad order unjustified.

II.

The Commission's cease and desist order is vague, ambiguous and meaningless.

Beyond the fact that the Commission's cease and desist order bears no reasonable relation to the violation

found, much of its language is vague, ambiguous and meaningless. As a result, several different provisions of the order fail to state any recognizable standard of conduct to which Bates would have to adhere in order to avoid future violations.

As the Supreme Court stated in *FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 367-68 (1962):

> "The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." (Footnote omitted)

See also Federated Nationwide Wholesalers Service v. *FTC*, 398 F.2d 253, 260 (2d Cir. 1968) ("[W]e cannot sanction a remedy which leaves open no path on which [respondents] can 'travel without anxiety' * * *.")

The provisions of the order which present this problem most acutely are subparagraph 1.b., subparagraph 1.d. and paragraph 2.

Subparagraph 1.b.

Subparagraph 1.b. orders Bates to cease and desist "in connection with the advertising, offering for sale, sale or distribution of any food product," from disseminating or causing the dissemination of any advertisement which represents, "directly or by implication":

> "*The comparative nutritional efficacy or value of the product* without stating the brand, product or product category to which the comparison is being made." (App. 183, Order, p. 2; emphasis added)

The problem with this provision is in comprehending the italicized words. In this case the Commission has ruled that the advertising at issue contained an *implied*

representation that Wonder Bread is an "extraordinary food" for producing dramatic growth in children. The Commission also concluded that this representation:

> "* * * was itself a comparative claim, as it clearly suggested that Wonder Bread is superior to *some* food products as far as nutritional qualities are concerned." (App. 275, Order on Reconsideration, p. 4; footnote omitted)

Yet, the word "extraordinary" was not used in advertising Wonder Bread and the "extraordinary food" claim was instead "implied" by the Commission from various descriptions of the product's nutritional qualities —none of which descriptions was itself expressly comparative.

The risk Bates perceives in subparagraph 1.b. is that *any* nutritional claim made by it in future advertising may be held to be a "comparative claim"—at least in the peculiar sense in which the Commission views the concept of comparison. Indeed, from its decision in this case, the Commission seems willing to infer that any claim that a food product has nutritional value is a comparative claim, even where the claim can be scientifically or medically substantiated. If Bates prepares or places an advertisement truthfully stating that a food product contains certain vitamins in certain quantities or is a useful source of protein, is such a statement a claim of "comparative nutritional efficacy or value of the product" advertised? Only the peculiar reasoning the Commission has used in this case would suggest this to be the case, but the order is that of the Commission and its view of it may well predominate in some subsequent enforcement hearing.

It is surely not in the public interest to bar advertisers from informing the public truthfully about specific nutritional qualities of specific foods—whether or not there are other products that also offer those qualities.

Indeed, in *Coca-Cola Co.*, 3 CCH Trade Reg. Rep. ¶ 20,470, at 20,397 (FTC 1973), involving nutritional advertising for "Hi-C" fruit drink, the Commission emphasized that if implied claims are to be inferred where no comparative words are used, "care must be taken not to prevent advertisers from making truthful and informative declarative statements." But if any advertising of any nutritional quality of a food product is to be read as a comparative claim, requiring Bates to state a "brand, product or product category" to which this wholly theoretical "comparison" is being made, the effect upon Bates would be to bar it from, or severely limit it in, referring to nutrition at all in such advertising.

We submit that nothing in the record of this case can be read to support such result and that subparagraph 1.b. should be stricken from the order.

Subparagraph 1.d.

Subparagraph 1.d. would also appear to bar Bates from participating in the preparation or placement of certain types of advertising—whether or not any misrepresentation results. That subparagraph outlaws advertising which represents, "directly or by implication":

> "The functional value or other attributes of any [food] product to a user through the use of demonstrations or other visual techniques unless the demonstrations are actual depictions of the actual value of the product by actual persons and represent the average and ordinary experience of consumers with the use of the product." (App. 184, Order, p. 3)

Subparagraph 1.d. is virtually a paraphrase of that provision of the order originally entered by the Commission in the *Rapid Shave* case that barred respondents from:

> "Representing, directly or by implication, in describing, explaining, or purporting to prove the qual-

> ity or merits of any product, that pictures, depictions, or demonstrations * * * are genuine or accurate representations * * * of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accurate representations * * * of, or do not prove the quality or merits of, any such product." (59 F.T.C. 1452, 1477-78 (1961))

The Court of Appeals reversed that portion of the order, and the Supreme Court, when reviewing the much narrower order ultimately entered in *Rapid Shave*,[12] characterized the provision quoted above as "potentially limitless, apparently establishing a per se rule prohibiting the use of simulated props in all television commercials, since commercials by definition describe 'the qualities or merits' of products." 380 U.S. at 380.

The only apparent difference between subparagraph 1.d. and the "potentially limitless" order rejected in *Rapid Shave* is that subparagraph 1.d. is broader and more confusing. Analyzing it is mind-boggling.

First, it bars any advertising of the "functional value or other attributes" of any food product "through the use of demonstrations or other visual techniques"—a phrase that literally would apply to *every* television commercial of any food product (unless one can conceive of a commercial that does not refer "directly or by implication" to *any* attributes of the product advertised). This is so because "demonstrations or other visual techniques"

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[12] The order ultimately affirmed in *Rapid Shave* barred respondents from "[u]nfairly or deceptively advertising any * * * product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein." 62 F.T.C. 1269, 1282 (1963).

is a phrase so broad as to include within its reach every commercial on television.

Next, any food commercial, to avoid running afoul of the orders, can contain only (i) an "actual depiction" of (ii) "the actual value of the product," (iii) by "actual persons," and must at the same time (iv) "represent the average and ordinary experience of consumers with the use of the product." How does one "actually depict" that a product tastes good or is fresh or that it contains the FDA-approved average minimum daily requirement for Vitamin C? How does one "actually depict" what the Commission calls "the actual value" of any food product —be it bread or soup or yogurt? Does subparagraph 1.d. outlaw the Jolly Green Giant? Are actors in television commercials "actual persons" within the meaning of the order?

Despite the Commission's explanation that it was included in the order because of the "previous use of the highly exaggerated 'growth sequence' commercials found to have the capacity to deceive" (App. 276, Order on Reconsideration, p. 5), subparagraph 1.d., whatever it means, plainly extends far beyond the abuse with which the Commission says it meant to deal. It should be stricken, or the order remanded to the Commission for formulation of a meaningful provision reasonably related to the violation found.

Paragraph 2

Paragraph 2 of the order requires Bates to cease and desist from

> "Disseminating, or causing the dissemination of, any advertisement * * * which represents, directly or by implication, that any [food] product will contribute to the rapid or *proper growth of children* by providing dramatic or *substantial benefits for such growth or development* unless such product, *by it-*

> *self*, will in fact make a significant contribution to such rapid or *proper* growth." (App. 184, Order, p. 3; emphasis added)

This Court can surely take judicial notice that there are some foods at least which contribute to the proper growth of children by providing substantial benefits for or making significant contributions to that proper growth. Certainly, there is nothing in the record of this case, and no finding by the Commission, that no such food exists.

So long as the advertising in question is truthful, there can be no rational basis for barring Bates, in advertising prepared or placed by it, from informing the public of the existence of these nutritional qualities in those foods which have them. The Commission itself in upholding the dismissal of that portion of the complaint dealing with Hostess Snack Cakes has recognized that truthful advertising of nutritional qualities is in the public interest (App. 222, Opinion, p. 24). Yet paragraph 2 would bar any advertising relating nutrition to children's growth unless the product advertised, "by itself," would make a significant contribution to proper growth.

No single food "by itself" will assure proper growth and development in children and if paragraph 2 will permit only a non-existent perfect food to be advertised as benefiting or contributing to children's growth, the order is ridiculous. If, on the one hand, "by itself" is intended to introduce into this order the same "uniqueness" claim originally alleged in paragraph 8(a) of the complaint—an allegation the Commission expressly rejected as unsupported in the record (App. 213, Opinion, p. 15)—the paragraph must be stricken as not reasonably related to the violation found. If, on the other hand, paragraph 2 is intended to bar advertising which falsely represents that consumption of a particular food product will result in *rapid* growth, the order should be remanded

to the Commission for formulation of language reasonably related to the violation found.

III.

Any order entered against Bates should contain a "knew or had reason to know" clause.

The Commission's order is also deficient in failing to include the "knew or had reason to know" clause that has routinely been part of orders entered against advertising agencies to afford them a defense in any subsequent enforcement proceedings. The result is to obliterate the distinction between advertisers and advertising agencies that was specifically recognized by the Supreme Court in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

In the *Rapid Shave* case, the cease and desist order approved by the Supreme Court contained a clause to the effect that the advertising agency would not thereafter be in violation of the order if it neither knew nor had reason to know that the particular advertising in question was deceptive (380 U.S. at 382 n. 8).[13] The Court recognized that the position of an advertising agency necessarily differs from that of the advertiser that retains it. The advertising agency "do[es] not have all the information about a product that the client has" and must rely to a considerable extent on the information supplied to it by the client (380 U.S. 382 n. 8). An advertising agency may not, of course, make any product

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[13] Similarly, in *Doherty, Clifford, Steers & Shenfield, Inc.* v. *FTC*, 392 F.2d 921, 929 (6th Cir. 1968), the cease and desist order under review contained a clause providing that the advertising agency would not be in violation if it "neither knew nor had reason to know of the falsity or deceptive capacity" of any future advertisements. In granting enforcement of that order, the court in *Doherty* specifically noted that the agency would be "protected adequately" by this clause (*ibid.*).

claim which it knows or has reason to know is false or deceptive. Nor may it exaggerate or misrepresent information given to it by the client. But, for example, the agency is not required to undertake an independent review of the technical and scientific data supplied by the client in connection with a particular product claim.

The Commission has also recognized the propriety of including "knew or had reason to know" language in orders entered against advertising agencies. For example, in *Toshiba America, Inc.*, C-2239 (July 3, 1972), involving allegedly false advertisement for microwave ovens, the consent decree entered against the advertising agency provided:

> "IT IS * * * ORDERED, that respondent, Norman, Craig & Kummel Inc. [the advertising agency] * * * in connection with the advertising * * * of microwave ovens * * * forthwith cease and desist from:
>
> (1) Representing * * * the issuance and effectiveness of any governmental, industry or other regulation or standard when respondent, Norman, Craig & Kummel, Inc. knew or should have known that such representation was false or deceptive;
>
> (2) Representing * * * that any such product complied with or conforms to any governmental industry or other regulation or standard, when respondent Norman, Craig & Kummel, Inc., knew or should have known that such representation was false or deceptive."

In the three consent decrees entered in the enzyme cases, *Lever Bros. Co.*, C-1899; *Colgate-Palmolive Co.*, C-1900; *Proctor & Gamble Co.*, C-1901 (April 12, 1971), the advertising agencies were ordered to cease and desist from

> "Representing directly or by implication, that any such product would remove all types of stains when

respondents knew or should have known that such representation was false or deceptive."

The order entered on consent in *Campbell Soup Co.*, File No. 692 3061 (July 30, 1969), contains similar language. There the manufacturer and its advertising agency agreed to cease and desist from certain practices, but those paragraphs of the order which dealt with the advertising agency included the following language:

> "IT IS ORDERED, that * * * Batten, Barton, Durstine & Osborn, Inc. * * * in connection with the advertising * * * of soup * * * cease and desist from:
>
> > Advertising any such product by presenting evidence, including tests * * *, that appears or purports, to be proof of any fact or product feature that is material * * * but which is not evidence which actually proves such fact or product feature, unless respondent neither knew nor had reason to know such to be the case."

We think it plain that the distinction between an advertising agency and the advertiser itself that the Supreme Court approved in the *Rapid Shave* case requires that a "knew or had reason to know" clause be read into any order entered against an advertising agency. The Commission's opinion in this case, however, tends to obscure this principle. For example, the Commission says that an advertising agency

> "* * * cannot make sweeping absolute claims or ambiguous claims and later assert in defense to charges of misrepresentation that it had no reason to know that the state of scientific knowledge on which these claims rested would not support them in the form in which they were made in the advertisement." (App. 226, Opinion, p. 28)

If the Commission's language is an attempt to reject what the Supreme Court said in *Rapid Shave* about an advertising agency's right to rely on its client for information, that is unacceptable. In any event, it is both appropriate and necessary for this Court to clarify the obscurity introduced by the Commission's language by modifying any cease and desist order entered in this case by the addition of a "knew or had reason to know" clause.

CONCLUSION

The complaint in this case charged ITT Continental and Bates with falsely advertising the nutritional qualities of Wonder Bread and Hostess Snack Cakes. Although the Commission agreed with an able Administrative Law Judge that none of the specific misrepresentations alleged in the complaint had been made, it still entered an unprecedented, sweeping order against ITT Continental and Bates. The sole basis for that order was a finding of implied misrepresentation that was neither alleged in the complaint nor defended against by either respondent. As ITT Continental argues in its brief which Bates has adopted, the manner in which the Commission proceeded in this instance was thus wholly improper and requires that the Commission be reversed and its order vacated.

But even were this Court to sustain the violation found below, reversal of the Commission's order would still be necessary. The order is vague and overbroad; it depends improperly upon prior consent decrees; its effect is punitive, not remedial; it prohibits truthful advertising; and it bars certain advertising claims which the Commission has found were never made. By refusing to include a "knew or had reason to know" clause, the Commission has chosen to ignore its own precedents as well as controlling judicial precedents. In short, the Commission's

order is insupportable and should be vacated, and the complaint dismissed.

Respectfully submitted,

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Dated: October 15, 1975

ANNEX A

IT IS FURTHER ORDERED that the following cease and desist order be, and it hereby is, entered:

I. IT IS ORDERED that respondent ITT Continental Baking Company, Inc., a corporation, and respondent Ted Bates and Company, Inc., a corporation, their successors and assigns and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any food product, do forthwith cease and desist from:

1. Dissemination, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication:

   a. The nutritional properties of any such product in generalized terms such as "rich in nutrients," vitamins or iron fortified, "enriched," or other similar nutritional references, unless the advertised nutritional value can be substantiated for the average and ordinary use of the product by consumers or by particular groups of consumers provided they are specified.

   b. The comparative nutritional efficacy or value of the product without stating the brand, product or product category to which the comparison is being made.

   c. The essentiality of the product as a source of a particular nutritional value if there are other food product categories which are also sources of the same or similar nutritional values, and

unless the claim can be substantiated for the normal use of the product by consumers or by a particular group of consumers provided that they are specified.

d. The functional value or other attributes of any such product to a user through the use of demonstrations or other visual techniques unless the demonstrations are actual depictions of the actual value of the product by actual persons and represent the average and ordinary experience of consumers with the use of the product.

2. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that any such product will contribute to the rapid or proper growth of children by providing dramatic or substantial benefits for such growth or development unless such product, by itself, will in fact make a significant contribution to such rapid or proper growth.

3. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which misrepresents, in any manner, the nutritional content, efficacy or functional value to the user for the normal use of any such product by consumers.

4. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal

Trade Commission Act, which contains any of the representations prohibited in Paragraph 1 above or the misrepresentations prohibited in Paragraph 2 above.

ADDENDUM

Statutes and Regulation Involved

Relevant provisions of Sections 5, 12 and 15 of the Federal Trade Commission Act (15 U.S.C. §§ 45, 52, 55):

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * *

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right

to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

* * * *

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * *

§ 52. Dissemination of false advertisements—Unlawfulness

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

Unfair or deceptive act or practice

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title.

§ 55. Additional definitions

For the purposes of sections 52 to 54 of this title—

False advertisement

(a) (1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of

such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.
* * *

Revelant provision of the Rules of Practice of the Federal Trade Commission (16 C.F.R. § 2.33):

§ 2.33 Agreement.

Every agreement shall contain, in addition to an appropriate order, an admission of all jurisdictional facts and express waivers of further procedural steps of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, and of all rights to seek judicial review or otherwise to challenge or contest the validity of the order. The agreement shall also contain provisions that the complaint may be used in construing the terms of the order, and that no agreement, understanding, representation, or interpretation not contained in the order or the aforementioned agreement may be used to vary or to contradict the terms of the order; that the order shall have the same force and effect and shall become final and may be altered, modified, or set aside in the same manner and within the same time provided by the statute for other orders; that the agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission; and that the Commission may withdraw its acceptance of the agreement if, within thirty (30) days after such acceptance, comments or views submitted to the Commission discloses facts or considerations which indicate that the order contained in the agreement is inappropriate, improper,

or inadequate. In addition, the agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.

CERTIFICATE OF SERVICE

I hereby certify that I have today served the foregoing Brief for Petitioner Ted Bates & Company, Inc. by causing copies to be hand delivered to the following:

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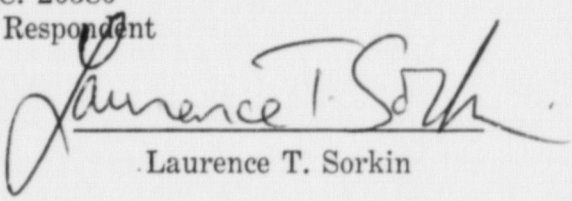

Laurence T. Sorkin

Dated: October 15, 1975